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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 338

GEORGE P. MOHR and GENEVIEVE B. MOHR,
Petitioners,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

ANNIE PITTI,
Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Respondent, in its Brief herein, cites the denial by this Court of a Writ of Certiorari in **Moses et ux. v. North Carolina State Highway Commission**, 379 U. S. 930, 13 L. Ed. 2d 342, and in **Hill-Behan Lumber Co. v. State Highway Commission of Missouri**, 314 U. S. 636.

In a memorandum opinion in **Agoston v. Pennsylvania**, 340 U. S. 844, Mr. Justice Frankfurter said:

> "The Court has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, it has been repeatedly stated, 'imports no expression of opinion upon the merits of the case.' (citing cases). A denial simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of a lower court. * * *
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> * * * * * * * *
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> "* * * The denial of the petition seeking to bring here the decision of the Supreme Court of Pennsylvania carries with it no support of the decision in that case, nor of any of the views in the opinion supporting it. * * *"

Moreover, **Moses** and **Hill-Behan** each involved a situation quite unlike that in this case.

In **Moses** there were certain facts and circumstances on account of which the Court might well have been required to give consideration to questions relating to estoppel and the interpretation of a deed.

The opinion of the Supreme Court of North Carolina in **Moses** is printed in 261 N. C. 316, and 134 S. E. 2d 664.

Moses was an action for compensation for an easement which Moses had acquired over property which abutted a highway. Moses had acquired such easement some time subsequent to the Highway Commission's proposal to enlarge the highway in order to convert it into an Interstate Highway, and subsequent to the time of the Highway Commission's survey and marking of the boundary of the enlarged highway (134 S. E. 2d at pages 665, 668). Also, the deed conveying such easement to Moses was executed

subsequent to the enactment by North Carolina of Chapter 993, S. L. 1957 (Art. 6D, c. 136 of the General Statutes of North Carolina), providing, inter alia, for the acquisition by the Commission of property and property rights, controlled-access facilities and service roads, the denial to abutting property owners of rights of access to new highway locations, and the consideration of such denial in determining general damages (General Statutes of North Carolina, chapter 136, § 136-89.52). In its opinion, 134 S. E. 2d at 668, the Supreme Court of North Carolina said:

> "This deed (granting the mentioned easement) was executed subsequent to the enactment of Chapter 993, S. L. 1957 (Art. 6D, c. 136 of the General Statutes). In examining it we are led to the conclusion that both petitioners and their grantors understood the law to be as we have here declared. **THE EASEMENT THEN GRANTED WAS TO CONTINUE ONLY 'UNTIL SUCH TIME AS THE SAID LAND SHALL BE CONVEYED TO OR TAKEN BY THE STATE HIGHWAY AND PUBLIC WORKS COMMISSION FOR HIGHWAY PURPOSES WITH ADEQUATE ACCESS ALLOWED TO SECOND PARTIES FOR THE OPERATION OF THEIR MOTEL AND RESTAURANT BUSINESS.'** * * * What highway were the parties talking about? Certainly they were not talking about 301 as it existed at the time of conveyance. **THE RECITALS IN THE DEED SHOW THAT THEY ANTICIPATED THE ENLARGEMENT OF THE HIGHWAY IN THE IMMEDIATE FUTURE.** * * *" (Emphasis supplied.)

It will be noted that in the deed to Moses it was provided that the easement was to continue only until such time as the subservient land was conveyed to or taken by the State for highway purposes "with **ADEQUATE ACCESS**" allowed to "Moses". Thus, Moses was not en-

titled to a **DIRECT** access. Under the terms of the deed Moses was entitled only to "adequate access". Moses was provided access by way of a service road and it may well be that the North Carolina Supreme Court concluded that Moses was thereby provided with "adequate" access.

In this case, however, Petitioners were the owners of and had **direct** access to the highway, and their right of access was not limited, as in **Moses**, to merely such access as might be deemed "adequate."

Further, in its opinion in **Moses**, 134 S. E. 2d at 668, the North Carolina Supreme Court said:

> "It is further provided in the deed, 'In case said land is taken by condemnation, first parties shall be entitled to and hereby reserve for themselves, their heirs and assigns, the right to the entire award for damages resulting from such condemnation, except damages, if any, for severance from said 3.7 acres of land in case adequate access is not available to the second parties, their heirs and assigns, and in such event, the said second parties shall be entitled to severance damages for loss of adequate access to **said highway.**'"

It is quite possible that this Court may have concluded that Moses were not the real parties in interest and had conveyed away any claim they might have had for damages for deprival of **direct** access.

In Hill-Behan, the situation presented was that the State Highway Commission had changed the grade of the highway within confines of the right of way to the inconvenience of the abutting owner. The Supreme Court of Missouri concluded that the owner could not recover in said case and in its opinion, 148 S. W. 2d 499 at 502, said:

> "* * * we base that conclusion on the absence of a statute authorizing damages to abutting property

owners, if damage results, when the state or its agency changes the grade of a public highway."

In its Brief Respondent treats the "Question Presented" as involving nothing more than "the right of access." We respectfully submit that such is not the case here. The question here presented arises out of the taking of the Petitioners' **DIRECT** access to the abutting highway.

Respondent cites the regulations of the Bureau of Public Roads of the United States Department of Commerce respecting damages considered eligible for Federal participation. We respectfully submit that such regulations can have no bearing on the Constitutional rights and issues involved in this case.

Respondent's Brief states that the rule expressed by the Missouri Supreme Court in this case has been expressed and applied by the Appellate Courts of other states named on page 9 of its Brief. The questions here presented are Federal questions and obviously the decisions of the Appellate Courts in various of the states are not here controlling. However, we call attention that in the St. Louis Court of Appeals' opinion in the case of Petitioners Mohr, at pages 36 et seq. of Petitioners' Petition for Writ of Certiorari herein, there are set forth decisions by the Appellate Courts of other states holding contrary to the Missouri decisions here involved. Similarly, the decision of the Supreme Court of Minnesota in the case of **Hendrickson v. State of Minnesota**, 127 N. W. 2d 165, holds contrary to the rule expressed by the Missouri Supreme Court in this case.

In **United States v. Oregon**, 366 U. S. 643, at page 645, this Court said:

"Because of the importance of this question of federal statutory construction and **AN ALLEGED CONFLICT BETWEEN THIS DECISION AND DECI-**

SIONS PREVIOUSLY MADE BY OTHER STATE COURTS OF FINAL JURISDICTION, we granted certiorari." (Emphasis supplied.)

Respectfully submitted,

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